TRADITIONAL CULTURAL PROPERTIES

VS.

TRADITIONAL CULTURAL RESOURCE MANAGEMENT

by

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ABSTRACT

The 1992 amendments to the National Historic Preservation Act stipulate that properties of traditional religious and cultural importance to Native Americans qualify for inclusion in the National Register of Historic Places. Such "sites" can be difficult for cultural resource personnel to manage because of the potential absence of associated material remains and the reluctance of traditional Native American leaders to reveal their locations. The management of these sites on ceded lands or within treaty areas can be particularly difficult because of possible unresolved legal issues concerning "ownership" and access. This paper concerns one approach to the identification and evaluation of such sites on the northern Plains and addressing these issues.

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INTRODUCTION

This paper is philosophical in nature. It is a reflection on the politics of archaeology from the perspective of those at the "local" level who are involved in the federal stewardship of Native American cultural resources. Considering how much archaeology is done in response to the National Historic Preservation Act (NHPA), actions by Congress and the Executive branch over the last ten years or so increasingly prescribe how archaeologists can pursue their profession. Archaeology may still be a science but its pursuit is increasingly being dictated by nonscientific interests. Diverse public interests are now directly involved in the cultural resource decision-making process and some of these public interests, most notably Native American tribes, have standing equal to or greater than that of the archaeology and cultural resource management sector. As a consequence, the universe of what is considered a cultural resource has expanded considerably and archaeologists, particularly those in the federal sector, are becoming involved out of necessity in activities traditionally outside the realm of the discipline. These changes reflect the concerns and interests of the Native American community and have come about primarily in response to these concerns.

Two topics are addressed:

- The impacts of recent federal actions on archaeologists and Native Americans, and
- Indian trust assets.

Specifically, this paper is aimed at those archaeologists who are involved in cultural resource management, although the issues discussed potentially affect any archaeologist that works with these resources on federal lands or with federal funds. Many archaeologists view these topics with trepidation, given the historic animosity that has often existed between Native Americans and archaeologists. However, the course has been set and these topics will have a tremendous impact on the future of the discipline, especially in this era of tribal self-determination and self-

governance. In this respect, the authors take a positive stance in that they believe that these issues have a potential to rejuvenate and expand the discipline, ultimately, making it more responsive.

Recent Federal Actions

The 1990s have witnessed a flurry of federal legislation, executive orders, and executive memos that concern Native Americans and that either directly or indirectly impact archaeology and cultural resource management.

Federal Legislation

The Native American Graves Protection and Repatriation Act (NAGPRA), the 1992 amendments to NHPA, and the amendments to P.L. 93-638, the Indian Self-Determination and Education Assistance Act, provide for greater involvement of Native Americans in archaeology and historic preservation, much more than was previously available to them. NAGPRA addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony discovered on federal or tribal lands. Native Americans are to be consulted when inadvertent discoveries or intentional excavation of such items occur on these from these lands. In this regard, NAGPRA recognizes Native American "ownership" of these items, a precedent first established in the Archaeological Resources Protection Act which states that archaeological resources on lands owned by a tribe or individual Indian landowners belong to that tribe or landowners.

The NHPA amendments recognize that tribes have a direct stake in the Section 106 process. When undertaking an activity on an Indian reservation, the federal agency must consult with the tribal government. Agencies also are encouraged to consult with tribes for activities within the boundaries of historic tribal homelands. More important, tribes now have the right to develop tribal historic preservation programs that have the same legal status as the state historic preservation programs. These stipulations are an acknowledgment that the sovereignty of tribal

governments extends into the arena of cultural resource management and represent an extension of the government-to-government relationship between tribes and the federal government.

The NHPA amendments also specify that “properties of traditional religious and cultural importance to Native Americans” can now qualify for inclusion in the National Register of Historic Places. To a certain extent, the designation that such properties qualify as historic properties addresses the inability of the American Indian Religious Freedom Act (AIRFA) to afford protection to Native American sacred sites. This designation also has expanded of the definition of “cultural resource” to include nonmaterial remains.

Most archaeologists and cultural resource manager probably are not familiar with the Indian Self-Determination and Education Assistance Act, otherwise known as “P.L. 93-638." Although this act is not historic preservation legislation, it is another avenue by which tribes can become directly involved in cultural resource management, one that tribes are increasingly exploring. The purpose of the act is to promote tribal sovereignty by allowing tribes to contract federal programs and projects available to Native Americans.

Originally, this act only applied to the Bureau of Indian Affairs (BIA) and the Indian Health Service but the 1987 amendments expanded the act to encompass all agencies within the Department of Interior and the Department of Health and Human Services. Agencies within these departments cannot refuse to contract with tribes except under five narrowly defined criteria. Further, the agency must assume that the tribe has the capabilities to perform the work for which it is contracting. The tribe determines the activities that it will perform and those that the agency will retain. The only functions a tribe cannot contract are the trust responsibilities of the agency although the tribe can contract for all the activities associated with that responsibility. The role of the agency is to provide technical assistance, not only during the performance of the program or project but also during the period of proposal development. A tribe can include any associated archaeological activities associated with the program and project for which it is contracting, although the federal agency retains the responsibility for compliance and must ensure that any

archaeological activities are performed according to agency standards. In the Bureau of Reclamation (Reclamation), Dakotas Area Office, cultural resource activities are included in all the contracted Indian projects. The role of the office's archaeologists is to provide technical assistance to tribes in developing their cultural resource capabilities and to that these activities comply with NHPA.

Executive Memoranda and Orders

Several executive actions also have impacted or have the potential to impact how we conduct archaeological investigations on federal lands or with federal funds. In 1991, President Bush issued a statement on American Indian policy that reaffirmed the government-to-government relationship between the Federal and tribal governments. In 1994, President Clinton signed a presidential memorandum that further endorsed this relationship. President Clinton's memorandum required all Executive branch departments, agencies, and bureaus to operate within this government-to-government relationship when involved with Indian tribes. Consultation is a primary component of this relationship, especially for federal activities in Indian Country.

The Secretaries of the Interior and Commerce have recently issued Secretarial Order No. 3206 that elaborates upon these executive memoranda. This order addresses tribal rights and the federal trust responsibility with respect to the Endangered Species Act. The important aspect of this order is that it reaffirms the government-to-government relationship necessity for tribal consultations under the Endangered Species Act; the same as for NHPA.

Finally, President Clinton signed Executive Order 13007 - Accommodation of Sacred Sites - in 1996. This order mandates that federal agencies consult with tribes to identify sacred sites on public lands and to consider the impacts of federal actions on these sites. "Sacred sites" as defined in E.O. 13007 constitute "properties of traditional religious and cultural importance to Native Americans." This order is another attempt to address the short comings of AIRFA.

Impacts

The impacts of these federal actions on cultural resource management are fourfold:

- Native Americans are now integral players in the management of archaeological resources;
- The universe of what is considered a cultural resource has expanded;
- The issue of ownership of data has been raised; and
- Archaeologists are becoming involved in activities traditionally outside the realm of the discipline.

These federal actions exemplify the responsiveness of recent administrations and Congress to Indian issues. These actions are aimed at increasing the ability of tribes to govern their affairs as sovereign nations, and are not restricted to cultural resources. Because much of what we study are the material remains of Native American history, it is only natural that Native Americans should be actively involved in the management of these remains. These actions also reflect another facet of the Native American concept of "cultural resources" - they define cultural resources more broadly then do most archaeologists.

This broader view is seen in the elevated status now given to "traditional cultural properties" (TCPs), or sacred sites. The elevation of such sites is a major shift in cultural resource management. Traditionally, cultural resources have been defined by the presence of physical remains - objects, features, building, structures, architecture. In contrast, traditional cultural properties are often defined by "place" or "setting"; material remains do not necessarily need be present. Further, such properties can be extremely large, such as the Black Hills or Bear Buttes, or they can be extremely small, such as an offering.

Obviously, the identification of such sites poses problems for those archaeologists and cultural resource managers schooled in the use of material remains to identify historic properties. Identification is most effectively done through consultations with elders and traditional leaders.

But this possesses a problem for many archaeologist and cultural resource managers because these elders often do not want to divulge information about these sites to outsiders. They are skeptical, at best, about working with archaeologists and question their motives. More importantly, they consider such information private and to divulge it, especially to a "wasichu" archaeologist, would be sacrilegious.

This problem of disclosure brings up the issue of "ownership of data." In the Northern Plains, this issue is increasingly coming to the fore as tribes become more sophisticated about and more actively involved in cultural resource management. Many of them believe that not only the resources but any information about them, including published reports, belong to the tribe. These data represent intellectual property rights. These tribes are of the opinion that they have the sovereign right to determine who gets access to the data, including the federal agencies that often have paid for the collection of this information. It is an issue that, sooner or later, federal agencies are going to have to address.

The long and the short is that archaeologists are no longer the sole proprietors and interpreters of pre-European history. Compliance with these actions by Congress and the executive branch rest with those archaeologists and cultural resource managers in the federal sector. However, these actions have the potential to affect any archaeologist working on federal or tribal lands, working with federal collections, working with tribes, or conducting investigations with federal funds, or requiring a federal permit.

INDIAN TRUST ASSETS

This brings us to the latest "hot topic" - that of "Indian trust assets" or "resources." In Reclamation, we refer to these as "ITAs." ITAs are defined in the implementing regulations for P.L. 93-638. They are:

> ". . . an interest in land, water, minerals, funds, or other assets or property which is held by the United States in trust for an Indian tribe or an individual Indian or

which is held by an Indian tribe or Indian subject to a restriction on alienation imposed by the United States"

A spin-off of the executive orders cited earlier is that agencies must assess the impacts of their activities on these trust assets. In Reclamation, as with many other agencies, this assessment is addressed through the National Environmental Policy Act process. Because of the professional involvement of archeologists and cultural resource managers with Native American cultural resources and history, the responsibility for this assessment often lands on the shoulders of the cultural resource staff. Unfortunately, these assets do not constitute cultural resources as traditionally defined so they cannot be identified through traditional means. Consequently, archaeologists and cultural resource managers face the problem of how to identify them.

To assess ITAs and the government's responsibility with respect to them, one first must understand the relationship between tribes and the federal government. This relationship - the trust relationship - has been defined through treaties, statutes, executive orders, and legal decisions and is based on the concept of tribes as sovereign governments. Consequently, when a tribe "agreed" to give up, or "cede," lands, rights, or resources to the government - either through treaty or executive order - the government, in turn, agreed to provide certain goods, services, and protections. Ostensibly to protect tribal interests, the government placed in trust the lands, resources, and rights that a tribe did not give up, or "reserved," thereby establishing the government's interest in such assets and cementing the "trust relationship." These lands which for the most part constitute today's reservations, along with the resources and rights, comprise ITAs.

For projects on trust lands within or adjacent to a reservation, ITA assessment is straightforward, and is accomplished through consultations with the appropriate tribe and the BIA. The problem is with projects on lands ceded by treaty or executive order. Historically, tribes often signed several treaties or were involved with several executive orders, and these often had conflicting clauses. In the Dakotas Area Office, Angostura, Pactola, Deerfield and Keyhole reservoirs exemplify this situation. Although removed from the modern reservations, these

reservoirs are within lands set aside for the Great Sioux Nation in the Ft. Laramie treaties. The Sioux tribes no longer have direct control of these lands, but the tribes may still retain rights of access for hunting, fishing, or gathering, or rights to the waters. These rights may qualify as ITAs but the only method to determine accurately their status is to review the relevant treaties.

The Dakotas Area Office, through funds provided by Reclamation's Native American Affairs Office, has recently begun a pilot project to address this issue. The project involves a review of the treaties and executive orders associated with the tribes that either currently resides in or historically occupied the areas served by the Dakotas Area Office as established by the Indian Claims Commission. The purpose is to identify the geographical area covered by each treaty or executive order and any reserved rights that the appropriate tribe may have retained with respect to this area. The project has three objectives:

1) Develop a GIS database from applicable treaties and executive orders that identifies the applicable tribe(s), the lands - both ceded and trust - included in the treaties, and any trust assets, including reserved rights, associated with those lands or tribe(s).

2) Determine the legal responsibilities with respect to reserved rights for Reclamation activities on ceded lands.

3) Develop and implement an ITA assessment and consultation process for such activities to be incorporated into the NEPA process.

The result will be a management tool whereby the Dakotas Area Office can proactively identify during the planning stage any ITA that may be affected by a project or activity.

The WEB has been an invaluable resource in this research. Numerous sites, such as EnviroTech [http://www.envirotech.org/cgi-bin/web_evaluation], provide searchable lists of the United States Code (U.S.C), the Code of Federal Regulations (C.F.R.), the Federal Register, Presidential Executive Orders, Indian Tribal Codes; and Tribal Agreements and Treaties. Another primary

source is the *Indian Question*, a CD-ROM database that contains Charles J. Kappler's "Indian Affairs, Laws and Treaties, Volume II. (Treaties)," published in 1904.

Reclamation staff are still assembling and evaluating the treaties and executive orders. To date, six ratified and three unratified treaties have been cataloged and reviewed but these are only the most recent treaties; another 79 executive orders, including possibly 37 executive order treaties, that may pertain to the area have been identified. Executive order treaties were executed after 1871, when Congress ended the formal treaty-making process. These, along with the older treaties, remain to be reviewed and analyzed. Gathering the documents is easy; the real challenge has been their analysis since the interpretation of treaties and executive orders fall under the umbrella of Indian law, an arena with which few cultural resource personnel are familiar.

Upon completion of the analysis, the plan is to consult with the tribes to get their input on the resulting products - the GIS database and the NEPA process. Reclamation also will use this occasion to consult as to locations identified in these treaties qualify as TCPs. Finally, Reclamation will invite the respective tribes to enter into formal agreements that address appropriate methods to evaluate and assess project impacts to ITAs.

CONCLUSIONS:
IT'S DIFFERENT WORLD OUT THERE TODAY!

Today, the activities of archaeologists and cultural resource managers, especially those associated with Native Americans, increasingly are being determined by legislation rather than by "science." While archaeology and cultural resource management are becoming more circumscribed, the involvement of Native Americans is expanding, not only in the arena of cultural resources but others as well. Tribes are only now beginning to appreciate the potential of casino revenues for Congressional lobbying. Many archaeologists, in their roles as cultural resource managers, now find themselves more actively involved in Native American issues and these often extend beyond cultural resources. To a large extent, this new role is a natural outgrowth of the historic

preoccupation that many archaeologists have with Native American cultural resources and the discipline's history of involvement with tribes through the cultural resource legislation.

TCPs and ITAs are outside the boundaries of the items traditionally considered under cultural resource management. The authors argue, though, that these classes of resources should be studied by archaeologists if they are truly interested in all aspects of human prehistory/history. In a theoretical sense, the identification and evaluation of TCPs offer the opportunity to "round out" the archaeological record since many of these "sites" have historical significance and their use extends back in time. The point is that such sites represent another, important and integral aspect of the use of the landscape.

The era of Native American archaeology, with its different concepts of "cultural resources" is with us. For the health and growth of the discipline archaeologists need to embrace it; only in that manner can practitioners of the discipline overcome the traditional animosity between Native Americans and archaeologists. Professionals must become more "cultural" in their approach in order to find common grounds of communication and information sharing. After all, both groups - archaeologists and Native Americans - share a common interest: the preservation of Native American heritage; the two just have different approaches and interpretations.